

91-738

Supreme Court, U.S.

FILED

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IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1990

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RANDY ARDEN FRIEUF,

Petitioner,

v.

UNITED STATES OF AMERICA,  
FARM CREDIT BANK,

Respondents.

-----  
PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT  
-----

WILLIAM L. NEEDLER  
WILLIAM L. NEEDLER  
& ASSOC., LTD.  
8 S. Michigan Ave.  
Suite 1300  
Chicago, IL 60603  
(312) 236-1118  
(Record Atty. for  
Petitioner)



QUESTIONS PRESENTED

1. May the bankruptcy court, or any other court, permanently or temporarily, lawfully disqualify, for any cause it deems sufficient, all existing dischargeable debts from discharge, pursuant to 11 U.S.C. 349(a)?
2. May the bankruptcy court deny the discharge of debts on the basis of bad faith?
3. Must the bankruptcy court obey the Code provisions relating to dischargeability (i.e. Code Sections, 11 U.S.C., secs. 1141 and 523) when determining "cause", and limit itself to the grounds contained therein?
4. May the Court of Appeals exercise original jurisdiction to impose new restrictions on Debtor that were never

at issue below and upon which there was never a hearing?

5. Does the Court of Appeals Opinion devolve excessive, unreasonable and unlawful powers on the bankruptcy court in violation of due process guarantees in Amendment 5 to the Constitution of the United States, and in violation of Article I, section 1 of the Constitution?

6. Does the conduct of Debtor warrant denial of discharge of all presently dischargeable debts, for a period of three years, and may such conduct lawfully be the grounds for such a denial?

#### **LIST OF PARTIES**

The parties to this appeal are as follows:

The Petitioner is Randy Arden Frieouf, a farmer who has sought protection under Chapter 11 of the Bankruptcy Code.

His attorney is William L. Needler, whose name and address appears on the front of this petition.

The Respondents are the United States of America and one of its agencies, Farm Credit Bank. The United States is represented by Kay Sewell, Asst. U.S. Attorney, 200 N.W. Fourth Street, Room 4434, Federal Courthouse Building, Oklahoma City, OK 73102; (405) 231-5281. The Farm Credit Bank is represented by G. Blaine Schwabe, III, Kevin M. Coffee of Mock, Schwabe, Waldo, Elder, Reeves & Bryant, 211 N. Robinson, 15th Floor, One Leadership Square, Oklahoma City, OK 73102; (405) 231-5281.

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RANDY ARDEN FRIEOUF,

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**PETITION FOR WRIT OF CERTIORARI  
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FOR THE TENTH CIRCUIT**

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The Petitioner, Randy Arden Frieouf, the debtor in this case, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above proceeding on July 10, 1991. Should the judgment of the

Court of Appeals for any reason be deemed interlocutory, Debtor submits that such is still reviewable pursuant to the Forgay v. Conrad doctrine (Forgay v. Conrad, 47 U.S. 201, 205-6). Should the Court of Appeals Opinion and Order in the case not be deemed to constitute a judgment for the purpose of review, then Petitioner requests this Court to exercise its original jurisdiction and issue a writ of mandamus compelling the Tenth Circuit Court of Appeals to modify its Opinion and Order so as to prevent irreparable harm to Petitioner and all others similarly situated.

#### **OPINIONS BELOW**

The July 10, 1991 opinion of the Court of Appeals for the Tenth Circuit has been published, and appears as In re Randy Arden Frieouf, Debtor; Frieouf v.

United States, et al., 938 F. 2d 1099 (10th Cir. 1991). The Court of Appeals Opinion also appears at A 2, et seq.<sup>1</sup> No rehearing was requested, as neither the Petitioner, nor his counsel can afford the expense of futile additional further proceedings below, the object of which are to foreclose the Debtor. Also, the extreme importance of the issues addressed here to all debtors, now and in the future, compels immediate application to this Court.

The district and bankruptcy opinions are unreported. The district court's opinion appears here at A 30. The bankruptcy court's Order On Motions to Dismiss appears at A 40; and the bankruptcy court's Order of Dismissal

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<sup>1</sup>A stands for the Appendix attached to this Petition.

Appears at A 62.

#### JURISDICTION

Federal jurisdiction over the bankruptcy proceedings below is conferred by Title 11, United States Code (the Bankruptcy Code), and arises under 28 U.S.C., sec. 1334 and sec. 157. Petitioner appealed the order of the bankruptcy court dismissing this case with prejudice to any refiling under the Bankruptcy Code for a period of three years, pursuant to 28 U.S.C., sec. 1334 and 158. The District Court affirmed the bankruptcy court's opinion and Petitioner then took an appeal to the Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C., sec. 158(d).

The Court of Appeals reversed, and held that the bankruptcy court had the power to permanently or temporarily

disqualify a class of debts from discharge upon dismissal of a bankruptcy case, and accordingly it was fair for the Court of Appeals to temporarily deny discharge of all of the debts that could be discharged in debtor's Chapter 11 case for a period of three years. The Court of Appeals reversed and remanded the district court's order only "to the extent it affirms the judgment of the bankruptcy court denying debtor all access to the bankruptcy court beyond 180 days for debts not related to this case." The Court of Appeals, however, "AFFIRMED the order of the District Court to the extent that it affirms the bankruptcy court's judgment dismissing the case, but only insofar as it temporarily denies debtor a discharge of the debts dischargeable in this case for

a three year period. It is this so-called "affirmance" that debtor asks this Court to set aside. It is believed that the statute that confers jurisdiction upon this Court to review by way of certiorari decisions of the Court of Appeals in matters of this kind is 28 U.S.C., sec. 1254(1).

#### STATUTES INVOLVED

This case involves the scope and meaning of Bankr. Code, 11 U.S.C., sec. 109(g) and 349(a), which appear verbatim in material part at A. 13-14. The case also involves recognition of Bankr. Code 11 U.S.C., secs. 523 and 727.

#### STATEMENT OF THE CASE<sup>2</sup>

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<sup>2</sup>Unless otherwise noted, the facts set forth are undisputed and are supported by the bankruptcy court docket in this case (to be forwarded to this Court along with the rest of the record below.

On September 20, 1985, Debtor Frieouf filed his Chapter 11 petition, seeking to reorganize as a farmer thereunder.<sup>3</sup> On October 7, 1985, Debtor filed his Schedules, and also filed a motion for use of collateral, which was subsequently granted on October 28, 1985.

On October 28, 1985, Debtor applied to appoint counsel which was granted on November 13, 1985.

On October 29, 1985, Federal Land Bank (now Farm Credit Bank) applied for relief from stay for its two loans to debtor, and on November 27, 1985, Debtor responded.

On December 3, 1985, the Bankruptcy

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<sup>3</sup>No creditor has challenged Debtor's status as a farmer, however, the district court states that there is nothing in the record to establish this fact, but, of course, that is not true. The Farm Credit Bank would hardly be in this case if Debtor were not a farmer.

Court granted relief from stay to Federal Land Bank on its two loans because of Debtor's failure to comply with the timing for response required by local rule.

On December 11, 1985, the Bankruptcy Court struck Debtor's Response to Federal Land Bank's Motion for Relief from Stay, and Debtor appealed on December 13, 1985.

Between December 13, 1985 and June 25, 1987, other creditors attempted to secure relief from stay so that they would be in the same position as Federal Land Bank with varying minor degrees of success.

On June 10, 1986, Debtor filed his plan of reorganization.

On June 25, 1987, the United States District Court for the District of Oklahoma, reversed the Bankruptcy Court and

vacated the two orders granting Federal Land Bank relief from Stay on its loans.

On June 30, 1987, Federal Land Bank filed a Motion to Dismiss, and on July 8, 1987, the FmHA (this entity has also been changed, but is represented then as now by the United States).

On July 28, 1987, the Federal Land Bank requested a hearing on its Motion for relief from stay.

On August 14, 1987, an agreed order for adequate protection to the Federal Land Bank (FLB) was entered.

On September 15, 1987, Debtor filed his Amended Plan and Disclosure Statement.

On October 13, 1987, FLB withdrew its motion to dismiss.

On December 1, 1987, FLB objected to Debtor's Disclosure Statement, even

though it had settled and withdrawn its Motion for relief from Stay on August 31, 1987.

On January 20, 1988, unable to agree to value, FLB moved to determine the value of real property, and on February 29, 1988, a hearing on value was held and FLB was to submit an agreed order.

On April 15, 1989, FLB moved for relief from Stay and to reduce time for response so that it could offer restructuring to the Debtor; and on June 8, 1988 the Debtor was given permission to participate in this federal farm program, and the stay was relieved to permit this participation.

On September 30, 1988, FLB again moved to dismiss the Chapter 11 case and Debtor objected on October 21, 1988 with brief in support.

On December 13, 1988, the Court ordered agreed modification to the Disclosure Statement, but all three major creditors filed objections to the Plan and filed ballots rejecting it. Also a dispute as to land valuation arose on the property upon which Grant County Bank had a lien. (See transcript of proceeding of February 25, 1989, p. 6-8).

On January 25, 1989, the Bankruptcy Court held a hearing on the Plan, but there had been confusion as to whether the Disclosure Statement had been approved, since creditors' consent to the required modification could not be obtained. The confusion was no fault of debtors, and the confusion was shared. Kevin Coffee, attorney for Farm Credit Bank, at one point even informed debtor's counsel that there was no

hearing scheduled for January 25, 1989  
(Tr. 1/25/89. p.15-18).

The bankruptcy court directed Debtors to respond in 9 days to the oral motion to convert the case to Chapter 7 and the motion to dismiss, with and without prejudice by Friday, February 3, 1989. (Tr. 1/25/89, p.26). The Court also directed the following:

" I will receive this response on or before February 3. No further hearing will be set. No further pleadings will be filed until the motion to dismiss and the motion to convert have been acted upon by the Court.

Meanwhile, unbeknown to Mr. Truax, the attorney handling the Debtor's case, his law firm was experiencing extreme financial difficulties due to an unexpected inability of many farmers to pay for legal services. Mr. Truax's employment, of necessity, came to an end on February 15, 1989 when the downtown

Chicago offices of William L. Needler were closed. (See Motion to Reconsider and Vacate, etc. order on Motions to Dismiss and Motion to Reschedule the Show Cause Hearing, (p. 4-5). Where there were four lawyers before, there was now only one -- William L. Needler.

Nevertheless, before his departure, timely filed debtor's Objection to Motion to Dismiss, Objection to Request for Conversion and Brief on February 3, 1989, and requesting a hearing on the grounds of due process.

On February 14, 1989, the Bankruptcy Court filed its Order on Motions to Dismiss (A. 40), holding that Debtor's dilatory and contumacious conduct over the course of the proceedings required dismissal with prejudice; that conversion to Chapter 7 would be denied on the

ground that a farmer cannot be liquidated; that the motions to dismiss, however, would be held in abeyance until a hearing on February 28, 1989, at which time the debtor was directed to show cause why the bankruptcy case should not have been dismissed under sections 349(a) and 109(g) of the Bankruptcy Code. The reason for this hearing, according to the bankruptcy court, was to give Debtor a fair chance to explain the conduct of the case in light of the Court's previously announced statement that dismissal with prejudice was not warranted in the case.

The bankruptcy court's order was received by the Needler firm in Chicago on February 16, 1989 when most of the staff had departed and Mr. Needler was out of town. The order could not receive his attention until Monday, February 20,

1989. Even so, Attorney Needler was able to put together a Motion to Reconsider, Vacate, ... and Modify the February 14 order. On February 25, 1989, it was discovered that Attorney Needler could not possibly journey all the way to Oklahoma to attend the show cause hearing on Tuesday, February 28, 1989, because of a scheduling conflict and an inability to leave Chicago for long at this critical time for the Needler firm. Debtor Frieouf could not be available either because of his mother's untimely death. Accordingly, on Sunday, February 26, 1989, Attorney Needler requested the bankruptcy court by Express Mail to postpone the hearing, which was received by it on February 27, 1989.

Nevertheless, the court went forward with the hearing on February 28, 1989,

dismissed the case with prejudice, denied the debtor's Motion to Reconsider and Vacate, etc., the order of February 14, 1989, and allowed Farm Credit Bank to submit cases in support of a dismissal with prejudice for three years.

On March 1, 1989, counsel for Farm Credit Bank submitted cases.

On March 8, 1989, the Bankruptcy Court dismissed this Chapter 11 proceeding for a farmer with prejudice for three years. (A 62 et seq.)

On March 20, 1989, an appeal to the District Court of the bankruptcy court's order was filed. On August 26, 1989, the debtor's requested an emergency stay pending appeal, which was denied. On December 29, 1989 the District Court, Ralph G. Thompson, Judge Presiding, affirmed the bankruptcy court (A 30 et

seq.)

On January 29, 1990, an appeal of the District Court's order was filed to the Court of Appeals. On July 10, 1991, the Court of Appeals reversed the district court's affirmance of the bankruptcy court's restriction of three years before debtor could file another bankruptcy proceeding, but imposed one of its newly-devised holdings that all debtor's presently dischargeable debts could not be discharged in another proceeding for three years. This petition seeks to reverse this holding and give debtor and all others similarly situated the opportunity of a fresh start.

## REASONS FOR GRANTING THE WRIT

### I.

THE COURT OF APPEALS HAS IMPERMISSIBLY LEGISLATED ADDITIONAL NON-DISCHARGEABILITY POWERS, AND HAS ERRONEOUSLY EXERCISED ORIGINAL JURISDICTION TO APPLY SUCH POWERS IN DEROGATION OF PROCEDURAL DUE PROCESS.

The Court of Appeals opinion, with all due respect, is very elusive and unclear.

First, the Court of Appeals agrees with Debtor that the statutory construction in such cases as Lerch v. Federal Land Bank, 94 Bankr. 998 (N.D. Ill. 1989) (which strains to give authority for looking beyond section 109(g) and for prohibiting all access to bankruptcy court for more than 180 days), raises serious constitutional concerns and is contrary to the language and punctuation used by Congress in 11 U.S.C., sec. 349

(a) and 109(g).

The Court of Appeals further notes that a prejudicial dismissal under section 349(a) must be premised on bad faith conduct, and erroneously finds that Debtor was guilty of such conduct. Its prior decision in Hall v. Vance, 887 F. 2d 1041 (10th Cir. 1989) is somehow supposed to give guidance even though that case had to do with prejudicial dismissal, and nothing to do with non-dischargeability of debt. Presumably the dicta of Hall would permit a prejudicial discharge for a period of no more than 180 days, although Hall was not such a case. The relevance is not clear.

According to the Court of Appeals:

Accordingly, section 349(a), by its plain language, must be read as allowing a bankruptcy court, "for cause," to permanently disqualify a class of debts from discharge, but a

bankruptcy court may not deny future access to bankruptcy court, except under the circumstances of section 109(g).

There is now, and never has been, any doubt that the bankruptcy court may permanently disqualify a class of debts from discharge -- but these debts must be of a certain specific kind and certain specific procedures must be followed.

If a creditor requests that the bankruptcy court deny the "global" discharge of all debts, his objection is governed by the particular Code section relating to the proceeding he has filed. In this Chapter 11 case, such objections would be governed by 11 U.S.C., sec. 1141. Section 1141 states in material part:

(3) The confirmation of a plan does not discharge a debtor if--  
\* \* \* \*

(C) the debtor would be denied a discharge under section 727(a) of

the Code.

Section 727(a) of the Code contains ten very specific grounds upon which a debtor may be denied his discharge (i.e. the permanent non-dischargeability of all his debts). These grounds do not include the picayune and minor items of procedural negligence alleged against debtor (actually debtor's counsel) in this case.

However, the Court of Appeals does not order a permanent denial of discharge of all debt. What it orders is a temporary discharge of debt for a time certain of a certain class of debt (or so it says).

An action to avoid the dischargeability of specific debts, or classes of debt, is controlled by Section 523 of the Code, and is initiated by the filing of a complaint by a creditor. Section 523 is

applicable to any Chapter under the Code. The action is an adversary proceeding and is governed by Rule 4007 and Part VII of the Bankruptcy Rules. Presumably, an action could be brought to avoid dischargeability of a class of debt, but the rules regarding class actions would then apply also. No such class action proceeding has taken place below, nor has it been determined just which creditors, if any, may have been prejudiced.

In any event, Section 523 lists twelve specific grounds whereby the dischargeability of specific debts or classes of debt may be avoided. The grounds recited by the Court of Appeals in this case are not among the grounds enumerated in Section 523.

The "for cause" to which Code Section 349(a) refers is a prior

adjudication of non-dischargeability under either Section 1141 or 523. Section 349(a) is merely the Code section that prevents already non-dischargeable debts from being asserted in a subsequent proceeding. Said another way, Section 349(a) allows the assertion of dischargeability of debt in a subsequent proceeding unless the court has found cause under Sections 1141 or 523 to deny dischargeability.

Under no circumstances, does 349(a) empower any court to refuse to discharge debt. As stated in the Historical and Revision Notes to Code Section 727:

"This section is the heart of the fresh start provisions of the bankruptcy law. Subsection (a) requires the court to grant debtor a discharge unless one of nine conditions are met."

Would this Court really allow the bankruptcy court, or any other court, to add

to the Congressionally mandated list of conditions, either under Section 727 or 523, whereby the dischargeability of debt can be avoided? We think not. Certainly, never could a non- Article III court be endowed with such amazing powers.

The Bankruptcy Code must be read as a whole and not in isolated parts. See United States v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989). The clear language of Section 349(a) states that the dismissal of a bankruptcy case does not bar the dischargeability of debt in a subsequent proceeding unless the bankruptcy court has found cause to order otherwise, and the only way the bankruptcy court can find such cause is through adjudications under Sections 1141 or 523. Congress has spoken loudly on

this point, and there is no room for "judicial interpretation."

But, even were Section 349(a) to be interpreted as the Court of Appeals would have it, it cannot exercise original jurisdiction of the bankruptcy court to adjudicate whether the so-called "bad faith" described by it is sufficient to cause the non-dischargeability of debt. There would have to be a trial or hearing in the bankruptcy court on that issue, and not a judgment based on borrowed findings regarding some other issue.

It is violative of due process for the Court of Appeals to decide to charge and convict the debtor of new offenses without a hearing below on the specific charge. Such is in derogation of the due process provisions of Amendment 5 to the Constitution of the United States.

A bankruptcy court, indeed no federal court, may exercise powers that are not specifically conferred by law. To permit the bankruptcy court, or any other court, to make up the law regarding the grounds upon which dischargeability may be denied would far exceed the limited jurisdiction conferred upon the federal courts by the Constitution and upon the bankruptcy courts by Article I, section I of the Constitution; also see Aldinger v. Howard, 96 S. Ct. 2413, 247 U.S. 1, 49 L. Ed. 276 (1976).

It is not enough to say that "nothing prohibits" the bankruptcy court from exercising its discretion, for there must be specific authority allowing and empowering the bankruptcy court to act. Section 349(a) does not empower the Bankruptcy court, or any other court, to

invent new grounds for the denial of dischargeability of debt in the face of the specific Code provisions that govern these matters.

The wrongful expansion of bankruptcy powers in this case far exceeds the impermissible grant of power in Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S. Ct. 2858, 73 L. Ed 598 (1982), with devastating consequences for every bankruptcy litigant--for now with the bankruptcy court inventing grounds to deny dischargeability of debt the potential for abuse and corruption below is enormous. It is doubtful whether this Court will face a more important matter relating to bankruptcy and the debtor's fresh start.

## II.

### NEITHER DEBTOR NOR HIS COUNSEL WAS GUILTY OF BAD FAITH OR CONTUMACIOUS CONDUCT

It is curious that there was no real effort to accuse debtor of bad faith and contumacious conduct until the debtor announced that he proposed to file under Chapter 12 in the event the case was dismissed. As found by the bankruptcy court, this was the reason the creditors requested a prohibition on refiling for three years. A 64. In other words, it was only when bad faith had to be established to prevent a refiling that the creditors and the bankruptcy court "reviewed the record" to discover some bad faith.

There was, of course, no bad faith for the following reasons:

The debtor did not wait nine

months to file an initial plan of reorganization. The debtor was forced to wait. There is no specific time requirement for submitting a plan and disclosure statement.

The early stages of the case were consumed by dilatory motion practice of creditors seeking relief from the automatic stay. The bankruptcy court has neglected to mention, and so has the district court and the Court of Appeals, that the bankruptcy court granted relief from stay on a technicality to FLB. It was then necessary to pursue an extensive, unnecessary and expensive appeal. Of course, the results of the appeal would materially affect the debtor's prospects. No one moved to foreclose even in the absence of a stay pending appeal, so the better part of

valor was to await the decision of the district court.

The district court found in debtor's favor on June 25, 1987, over a year and one half after the filing of the petition. While Debtor filed a plan to indicate good faith at the nine month mark in the belief that an opinion from the district court would shortly be forthcoming, he could not file a disclosure statement because it would have simply been a useless and expensive exercise in futility with the decision of the district court unknown. Promptly on September 15, 1987, when the District Court decision was known, after the crops were in, and debtor's full story was clear, Debtor filed his Amended Plan and Disclosure Statement. There was no delay whatever except that caused by the

creditors. What then transpired, for the next year and one half, is related at pages 9 through 17 of this petition. None of these facts give rise to bad faith on the part of Debtor.

At no time did the creditors move to strike the Plan for failure of consummation, for everyone, including the Court, was hopeful that Debtor could re-organize by agreement of the parties. This was a case where selfish creditors demanded additional valuations as the farm economy improved. The creditors were not prejudice by any delay, they were materially assisted--and they were in fact the principal cause of delay.

It is clear that Debtor could re-organize under Chapter 12 because in that context his major creditors would not have been able to invoke the absolute

priority rule.<sup>4</sup> There could have been no more laudable result consistent with American principles of fair play, than to permit this case to be dismissed without prejudice so that Debtor could have refiled under Chapter 12 and thereby in due course satisfy all of his creditors.

Perhaps most egregious is the failure of the bankruptcy court to allow further time for a show cause hearing when the Needler firm was failing and had closed down its Chicago office. Anyone who has had to pick up the pieces of such a collapse would have great sympathy for those who were striving to make things right for all clients and would have made allowances. But that was not to be

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<sup>4</sup>The "absolute priority rule" permits large unsecured creditors to vote the unsecured portions of their claims so as to defeat any reorganization effort that does not satisfy them 100 percent.

because the creditors and bankruptcy court were looking for reasons to head off a refiling under Chapter 12. It is a pity they have succeeded so well.

It is untrue Debtor "disobeyed" court orders. Debtor does not have to "obey" court orders which he has obtained that are no longer viable because the circumstances have changed -- creditors wouldn't agree as indicated or promised. It is to be emphasized that the creditors were also present when any representations were made to the bankruptcy court.

It was alleged that failure to file monthly operating reports is a reason for prejudicial dismissal. However, the creditors neglect to mention that they didn't even notice their absence--for the simple reason that small farmers do not have the accounting capabilities that

other enterprises have, and there is little to report until the harvest is in and the profit is made. In Mr. Frieouf's case, however, a number of reports had been submitted to counsel--in the confusion at the Needler firm, they were thought to be copies of something the debtor had filed with the court. In the final stages of close-down there was more confusion as people departed the Needler firm without completing some of the tasks on hand, so that there was also a small delay in filing which the bankruptcy court expanded into a heinous offense.

None of the facts above have ever been disputed by the Respondents, for there is no rebuttal. The technique is to ignore the facts and tell half-truths.

It is, of course, irrelevant at this point what the allegations of bad faith

are because they are unproven -- the Court of Appeals has reversed and may not borrow findings below regarding another matter to infer bad faith sufficient to prevent the dischargeability of debt in another proceeding .

#### CONCLUSION

It would be a tragedy if the Tenth Circuit's Opinion were allowed to stand, for it radically alters the fresh start objectives of the Bankruptcy Code and makes dischargeability of debt a matter of bankruptcy court whim, rather than a matter of right, subject to clearly defined exceptions under the Code.

WHEREFORE, Petitioner requests this Court to grant his Petition and reverse that part of the Opinion and Order of the Court of Appeals that prevents Petitioner

from discharging any of his debts in a subsequent proceeding for a period of three years.

/s/ William L. Needler  
Attorney for Petitioner

William L. Needler  
WILLIAM L. NEEDLER & ASSOCIATES, LTD.  
8 S. Michigan Ave. Suite 1300  
Chicago, IL 60603  
(312) 236-1118

APPENDIX

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OPINION OF THE TENTH CIRCUIT,  
filed July 10, 1991.

## PUBLISH

UNITED STATES COURT OF APPEALS  
TENTH CIRCUIT

APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE WESTERN  
DISTRICT OF OKLAHOMA  
(D.C. No. CIV-89-1126t)

Submitted on the briefs:

William L. Needler of William L. Needler and Associates, Ltd. Ogallala, Nebraska (Bruce E. Hammer as Co-Counsel, Blackwell, Oklahoma), for Plaintiff-Appellant.

Timothy D. Leonard, United States Attor-

ney, Kay D. Sewell, Assistant United States Attorney, Oklahoma City, Oklahoma, for Defendant-Appellee United States of America.

G. Blaine Schwabe III, and Kevin M. Coffee, of Mock, Schwabe, Waldo, Elder, Reeves & Bryant, Oklahoma City, Oklahoma, for Defendant-Appellee Farm Credit Bank of Wichita.

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Before McKAY, SETH, and SEYMOUR,  
Circuit Judges.

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SETH, Circuit Judge.

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Debtor Randy Arden Frieouf appeals a decision of the district court affirming the bankruptcy court's dismissal of his Chapter 11 petition with prejudice to the filing of any bankruptcy petition for three years.<sup>1</sup> Debtor poses numerous

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<sup>1</sup>After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

challenges to the decisions of the bankruptcy and district courts. In our view, the pivotal question presented is whether the bankruptcy court had authority to deny debtor all access to bankruptcy relief for a period of three years.

I.

Debtor filed the underlying petition on September 20, 1985. In its initial stages, litigation in this case consisted almost entirely of motions by various creditors seeking relief from the automatic stay of 11 U.S.C., sec. 362(a). Debtor's exclusive 120- day period to file a plan of reorganization expired without any action being taken by the debtor.

Debtor eventually submitted a plan on June 10, 1986. However, the plan was

not accompanied by a disclosure statement as required under 11 U. S. C., sec. 1125(b). The bankruptcy court, on August 4, 1986, ordered debtor to file a disclosure statement by August 20, 1986, but debtor did not comply.

On June 30, 1987, the Federal Land Bank of Wichita (FLB) filed a motion to dismiss citing 11 U.S.C., sec. 1112(b)(2) and (3). Among the alleged grounds for dismissal were debtor's failure to effectuate a plan of reorganization or file a disclosure statement as ordered by the bankruptcy court, and debtor's overall unwillingness to prosecute this case in an expeditious manner. The bankruptcy court on September 4, 1987, set a hearing for October 6, 1987, to consider FLB's motion to dismiss. In response, debtor

filed an amended plan of reorganization and a disclosure statement on September 15, 1987.

The October 6 hearing was held as scheduled and, at that time, FLB's motion to dismiss was withdrawn without prejudice to its being refiled. The bankruptcy court then set a hearing for December 8, 1987, to consider approval of debtor's disclosure statement. The December 8 hearing was also held as scheduled, and debtor was directed to amend his disclosure statement within thirty days, and FLB was given ten days to review such amended disclosure statement. If no objections was filed, an agreed order was to be presented and debtor's plan of reorganization was to be set for a confirmation hearing.

No agreed order was ever presented. Farm Credit Bank of Wichita (FCB), formerly FLB, refiled its motion to dismiss pursuant to section 1112(b) on September 30, 1988. As alleged grounds for dismissal, FCB reasserted debtor's inability to effectuate a plan of reorganization and unwillingness to prosecute this case. Debtor, again faced with a motion to dismiss, filed an amended disclosure statement and a third plan of reorganization on November 17, 1988.

A hearing was set for December 13, 1988, to consider debtor's amended disclosure statement and FCB's motion to dismiss. At that hearing, FCB's motion to dismiss was denied without prejudice. Debtor's disclosure statement was

modified and approved as modified, and debtor was ordered to mail his plan of reorganization and disclosure statement to creditors by December 30, 1988, with a hearing on confirmation of the plan to be held by January 25, 1989.

On January, 1989, FCB once again refiled its motion to dismiss pursuant to section 1112(b). At the January 25 hearing, it was disclosed that neither debtor's plan nor his disclosure statement was ever mailed to creditors. FCB's motion to dismiss, which was later joined by the Farmers Home Administration (FMHA), was taken under advisement, and debtor was given until February 3, 1989, to respond to that motion. Debtor was specifically directed to address whether a dismissal should be with or without

prejudice.

On February 14, 1989, the bankruptcy court entered an order in which it reviewed the procedural history of this case and concluded that there had been little or no apparent effort on the part of debtor to formulate a confirmable plan of reorganization. The bankruptcy court specifically noted that:

"It appears that the only plans which have been filed have been filed solely to create an argument in opposition to various motions seeking to terminate the proceeding. The first plan was not even accompanied by a disclosure statement, and an approved disclosure statement is a necessary prerequisite to the solicitation of acceptances. 11 U.S.C., sec. 1125(b). The failure to file a disclosure statement continued, even after the court had ordered the filing of the same."

"The first amended plan of reorganization was accompanied by a disclosure statement, but after a hearing, when the court directed that the same be amended within thirty days, no further action was taken. The most recent disclosure statement and plan of reorganization were

filed 38 months after the initiation of these proceedings, and even after counsel for debtor was directed to transmit to creditors the plan and disclosure statement, as modified, no such transmittal was effected. Counsel now asserts that the court must convene a valuation hearing on certain of the debtor's assets and presumably must therefore once again convene a hearing to determine whether the disclosure statement should be approved, and, if approved, order a hearing on the confirmation of the plan. To date, there appears to be virtual universal rejection of debtor's proposed plan. This, after more than three years during which debtor's creditors have been prevented from exercising their rights with regard to claims against the debtor and his property by reason of the automatic stay."

Bankruptcy Court Order of February 14, 1989, at 5-6.

The bankruptcy court concluded that dismissal of this case with prejudice was warranted. Debtor, however, was given one last opportunity to show cause why dismissal with prejudice was not

justified.<sup>2</sup> FCB's and FMHA's motions to dismiss were held in abeyance, and a hearing was set for February 28, 1989, at which time debtor was expected to show cause why this case should not be dismissed with prejudice.

On the day before the date set for the show cause hearing, debtor filed a "Motion to Reconsider, Vacate, Alter, Amend and Modify Order on Motions to Dismiss and Motion to Reschedule Rule To

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<sup>2</sup>Debtor was given this extra chance to challenge the propriety of a prejudicial dismissal because the bankruptcy court, prior to its review of the record, had stated at the hearing on January 25, 1989, that it did not believe a dismissal with prejudice was appropriate. In the bankruptcy court's view it would have been "unfair," given its earlier indication that a prejudicial dismissal was not justified, to dismiss this case with prejudice "without allowing debtor an opportunity to show cause why the same should not be granted." Bankruptcy Court Order of February 14, 1989, at 10.

Show Cause Hearing." Along with that motion, debtor submitted a proposed order for continuance of the show cause hearing. The bankruptcy court did not enter the proposed order, and debtor failed to appear at the show cause hearing even though his proposed order was not entered.

On March 8, 1989, the bankruptcy court entered the order underlying this appeal, which dismissed this case "with prejudice to the filing of any bankruptcy petition by debtor for a period of three years." Bankruptcy Court Order of March 8, 1989, at 3. The bankruptcy court relied on debtor's failure to abide by its orders as described in its order of February 14, 1989, and debtor's failure to appear at the show cause hearing. The

district court affirmed, and this appeal followed.

II.

Section 1112(b) provides a nonexhaustive list of grounds upon which a bankruptcy court may dismiss a Chapter 11 case for "cause." On appeal, debtor does not argue that dismissal of his case was not justified under section 112(b). Instead, the focus of debtor's argument is on whether the bankruptcy court's decision to prevent him from filing any bankruptcy case for three years goes beyond the mandates of 11 U.S.C., sec. 349(a) and 11 U.S.C., sec. 109(a).

Section 349(a) provides that:

"Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the

dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title.

11 U.S.C., sec. 349(a).<sup>3</sup> Section 109(g)

provides in pertinent part as follows:

"Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if--

"(1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or

"(2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title."

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<sup>3</sup>As presently drafted, section 349(a) references section 109(f). However, this is the result of an oversight. Section 109(f) was redesignated section 109(g) by the Bankruptcy Judges, United States Trustees and Family Farmer Act of 1986, Pub. L. No. 99-554. A conforming amendment to section 349(a) was inadvertently not enacted.

11 U.S.C., sec. 109(g).

Debtor's position is that pursuant to section 11 U.S.C., sec. 349(a), bankruptcy dismissals are ordinarily without prejudice, and the bankruptcy court's power to deny him future access to bankruptcy court was constrained under section 349(a) by the 180-day limitation set forth in section 109(g).

We agree, in part, with debtor's argument. The task of interpreting section 349(a) "begins where all such inquiries must begin: with the language of this statute itself." United States v. Ron Pair Enterprises, Inc., 489, 241 (1989) (interpreting 11 U.S.C., sec. 506(b)). In this case, it is also where the inquiry ends, "for where, as here, the statute's language is plain, the sole

function of the courts is to enforce it according to its terms." Id. (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917).

By its terms, section 349(a) gives bankruptcy courts discretion to determine whether there is "cause to dismiss a case with prejudice. Under its precise language, however, section 349(a) only denies a debtor future discharge of debts dischargeable in that particular case. Section 349(a) does not deny a debtor all future access to bankruptcy court, except as provided in section 109(a).

The bankruptcy and district courts relied primarily on Lerch v. Federal Land Bank, 94 Bankr. 998 (N.D. Ill. 1989), as authority for looking beyond section 109(g) and prohibiting all access to

bankruptcy court for more than 180 days. In Lerch, the bankruptcy court ordered that the debtor was prohibited from filing a petition under Chapters 11,12, or 13 for a period of two years. The district court affirmed, holding that the phrase "[u]nless the court,, for cause, orders otherwise" at the beginning of section 349(a) modifies not only the discharge language preceding the semicolon in section 349(a), but also the filing provision which appears after the semicolon. Therefore, according to the district court, section 349(a) permitted the bankruptcy court, in its discretion, to prohibit the filing of any bankruptcy case beyond the limits of section 109(g).

Similar to Lerch, some bankruptcy

courts have also enjoined bankruptcy filings for some limited period beyond 180 days rather than deny a debtor a discharge of the debts dischargeable in that particular case. See In re Dilley, 125 Bankr. 189, 197 (Bankr. N.D. Ohio 1991) (one year); In re McKissie, 103 Bankr. 189, 193 (Bankr. N.D. Ill. 1989) (one year); In re Hundley, 103 Bankr. 768, 771 (Bankr. E.D. Va 1989) (one year). Like the Court in Lerch, these bankruptcy courts concluded that section 349(a) affords a bankruptcy court discretion to control future bankruptcy filings for over 180 days. Dilley, 125 Bankr. at 197-98 (citing Lerch); McKissie, 103 Bankr. at 193 (citing Lerch); Hundley, 103 Bankr. at 771.

In our view, Lerch and other courts

which have construed section 349(a) in the same fashion as Lerch have disregarded the binary structure of section 349(a) as reflected by both its punctuation and substantive content. The statute consists of two clauses, separated by a semicolon and addressing two distinct concerns: (1) the discharge in a later case of the particular debts dischargeable in the case dismissed and (2) the much different matter of the filing of any subsequent bankruptcy petition. Furthermore, each clause contains its own qualifying phrase; the discharge clause is modified by the "unless the court, for cause, orders otherwise" language, and the filing clause is modified differently by reference to section 109(g).

The Supreme Court has instructed that a statute must be read as "mandated by [its] grammatical structure." Ron Pair Enterprises, Inc., 489 U.S. at 241 (relying on location of commas in 11 U.S.C., sec. 506(b) to provide interpretation of statute). Accordingly, section 349(a), by its plain language, must be read as allowing a bankruptcy court, "for cause," to permanently disqualify a class of debts from discharge, but a bankruptcy court may not deny future access to bankruptcy court, except under the circumstances of section 109(g). Any other reading of section 349(a) is contrary to the language and punctuation used by Congress.<sup>4</sup>

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<sup>4</sup>The bankruptcy and district courts also cited 11 U.S.C., sec. 105(a) ("The court may issue any order, process, or

Moreover, we agree with debtor that the statutory construction in Lerch raises serious constitutional concerns. Depriving a debtor of access to the courts for 180 days is in itself a harsh remedy which may be questionable. See In Re Surace, 521 Bankr. 868, 871 (Bankr. C.D. Ca. 1985) ("The effect of 11 U.S.C., sec. 109(f) [now 109(g)] is to deprive

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judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." as additional authority for denying debtor all access to bankruptcy court for three years. Such reliance was misplaced. The broad equitable powers that bankruptcy courts have under section 105(a) "may not be exercised in a manner that is inconsistent with the other, more specific provisions of the Code." In re Western Real Estate Fund, inc., 922 F. 2d 592, 601 (10th Cir. 1990). Consequently, the bankruptcy court's three-year prohibition against filing a bankruptcy case, which plainly contradicts the 180-day limitation under section 109(g), cannot be sustained under section 105(a).

the debtor to relief under the Bankruptcy Code for 180 days, an extraordinary statutory remedy for perceived abuses of the Code.") (emphasis added). Interpreting section 349(a) and section 109(g) to allow bankruptcy courts to prohibit future filings for a period greater than 180 days, not only contradicts the statute's plain meaning, but encroaches on the fifth amendment's due process and equal protection guarantees. Carried to its extreme, nothing would prevent bankruptcy court from barring a debtor from relief under the Code indefinitely.

When alternative interpretations of a statute exist, the fact that one interpretation presents serious constitutional difficulties, is in itself reason to reject such an approach. See Edward

J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 572 (1988). We do not minimize the problem of a debtor who abuses the court process and disobeys court orders. However, remedies other than prohibiting a party from using a statutory remedy in an unrelated matter are available to bankruptcy courts to meet the problem.

III.

To implement our interpretation of section 349(a) under the circumstances of this case, we must break down the preclusive effect of the bankruptcy court's dismissal order into three components: (1) denial of all access to bankruptcy court for 1280 days; (2) denial of such access for beyond 180 days; and (3) temporary denial of discharge of sched-

uled debts. In light of our limiting construction of section 349(a), the first two components may be dealt with briefly. The bankruptcy court's denial of all access to bankruptcy relief for 180 days is not reviewable in as much as 180 days have passed. See Travelers Ins. Co. v. Donlin Farms, 90 Bankr. 48 (W.D.N.Y. 1988). The bankruptcy court's denial of all access to bankruptcy court for more than 180 days was beyond the authority conferred under section 349(a) and, consequently, cannot stand. Therefore, the only aspect of this case left for our substantive review is the question whether there was sufficient "cause" within the meaning of section 349(a) to justify temporarily denying debtor a discharge of the debts scheduled in this

case for three years.

After the bankruptcy court's dismissal order was entered, this court, in Hall v. Vance, 887 F. 2d 1041 (10th Cir. 1989), indicated that a prejudicial dismissal under section 349(a) must be premised on bad faith conduct that is prejudicial to a creditor. Id. at 1045 (vacating a dismissal with prejudice because "[t]he [debtors]' tardiness . . . does not support a finding of bad faith [and] . . . neither party moving for dismissal made a showing [that debtors' conduct] . . . prejudiced them"). Although the bankruptcy court did not have benefit of our decision in Hall when this case was dismissed, the bankruptcy court nonetheless made determinations that amounted to findings of bad faith, see

Bankruptcy Court Order of March 8, 1989, at 3 ("debtor has established a clear record of delay and contumacious conduct") and prejudice, see Bankruptcy Court Order of February 14, 1989, at 6 ("To date, there appears to be virtually universal rejection of debtor's proposed plan. This, after more than three years during which debtor's creditors have been prevented from exercising their rights with regard to claims against the debtor and his property by reason of the automatic stay."). Such determinations by the bankruptcy court are factual findings, see In re N.R. Guaranteed Retirement, Inc., 119 Bankr. 149, 153 (N>D> Ill. 1990) (bankruptcy court's finding that conduct is prejudicial to a creditor "essentially involves a factual deter-

mination"); In Re Can-Alta Proper-  
ties, Ltd., 87 Bankr. 89, 91 (Bankr. 9th  
Cir. 1988) ("[a] finding of bad faith is  
a factual determination"), which we re-  
view under the clearly erroneous stan-  
dard, see Hall, 887 F. 2d at 1043.

After carefully reviewing the record, we conclude that several facts and circumstances support the bankruptcy court's conclusion that debtor acted in bad faith and in a manner that was prejudicial to his creditors. First, debtor waited nine months before filing an initial plan of reorganization. Such plan, as noted by the bankruptcy court, was not accompanied by a disclosure statement, and the failure to file a disclosure statement continued for more than a year after the bankruptcy court had ex-

plicitly ordered the filing of one. Cf. Id. (filing by debtor of objections to proofs of claim and plan of reorganization three days and one day late respectively, under deadlines set by the bankruptcy court was not sufficient evidence to support finding that debtor acted in bad faith). Furthermore, it is significant that subsequent plans of reorganization were submitted by debtor only after motions to dismiss were pending. Finally, on the eve of the hearing provided by the bankruptcy court to give debtor an additional opportunity to show cause why his bankruptcy case should not be dismissed with prejudice, debtor filed a motion seeking continuance of the hearing, but made no effort to confirm whether the motion was ever granted, and

then failed to appear. Debtor's overall conduct throughout the proceedings in bankruptcy court evidences a pattern of evasion, and prevented creditors from exercising their rights against debtor for over three years. In view of these facts, we cannot say that the bankruptcy court's findings of bad faith and prejudice were clearly erroneous.

IV.

Accordingly, we AFFIRM the order of the district court to the extent that it affirms the bankruptcy court's judgment dismissing the case, but only insofar as it temporarily denies debtor a discharge of the debts dischargeable in this case for a three-year period. The district court's order is REVERSED and REMANDED to the extent it affirms the judgment of the

bankruptcy court denying debtor all access to the bankruptcy court beyond 180 days for debts not related to this case.

MEMORANDUM OPINION OF  
THE DISTRICT COURT,  
filed December 29, 1989

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT  
OF OKLAHOMA

**MEMORANDUM OPINION**

Before this Court is an appeal from  
the Order of Dismissal entered by the  
Honorable Paul B. Lindsey, United States  
Bankruptcy Judge for the Western District

of Oklahoma, in Case No. BK-85-03466-B (Chapter 11) on March 8, 1989. Randy Arden Frieouf, debtor appeals the court's dismissal of the captioned bankruptcy case with prejudice to any future filing of a bankruptcy petition for a period of three years, pursuant to 11 U.S.C., secs. 349(a) and 105(a). The issues for determination herein are (1) whether the bankruptcy court had any authority to dismiss the case with prejudice to any future filing of a bankruptcy petition for a period of three years, and (2) whether there was sufficient cause to justify the dismissal.

The Court finds that jurisdiction to consider the issues on appeal is present under the provisions of 28 U.S. C., secs. 1334 and 158. Pursuant to Bankruptcy

Rule 8013, findings of fact made by the court below shall not be set aside unless clearly erroneous; however, this Court reviews conclusions of law *de novo*. In re: New England Fish Co., 749 F. 2d 1277 (9th Cir. 1984).

In the above-referenced Order of Dismissal, the court below made a finding that "debtor has established a clear record of delay and contumacious conduct which justifies prohibiting the debtor from filing another bankruptcy petition for a period of time." (Order of Dismissal, pg. 3). The record upon which this finding is based reveals the following:

The debtor herein filed his voluntary petition in bankruptcy under Chapter 11 on September 30, 1985. On

March 8, 1989 -- the date the Order of Dismissal with prejudice was entered -- creditors were still without a consummated plan of reorganization upon which they could rely for satisfaction of the debtor's obligations to them. The debtor's actions and his counsel's actions in the three and one-half year interim are characterized by delay, inefficiency, dilatory tactics, failure to obey orders of court, and unprofessional and recalcitrant behavior. The specifics of this conduct are fully summarized in the February 14, 1989, Order on Motions to Dismiss and the March 8, Order of Dismissal, both of which were entered below, and which are incorporated herein by reference. This behavior culminated in debtor and debtor's counsel failing to

appear at a hearing set for February 28, 1989, at which debtor was directed to show cause why the bankruptcy case should not be dismissed with prejudice.

The court below relied on 11 U.S.C., sec. 349(a) in its dismissal of the bankruptcy case. Section 349(a) of the Code provides:

(a) Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(f) [sic] of this title.

While the language of 349(a) refers to section 109(f), it is thought that the reference is intended to be to section 109(g). "[T]he statute's reference to Section 109(f) was apparently an over-

sight on the part of the drafters of the legislation -- as current Code 109(g) was formerly Code sec. 109(f) and Code 349(a) obviously meant to refer to current Code sec. 109(g) . . . " Lerch v. Federal Land Bank of St. Louis, 94 B.R. 998, 1000 (N.D. Ill. 1989).<sup>1</sup> The debtor on appeal does not dispute that 11

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<sup>1</sup>11 U.S.C. sec. 109(g) provides as follows:

(g) Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title at any time in the preceding 180 days if--

(1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or

(2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by sections 362 of this title.

U.S.C., sec. 349(a) intends to refer to section 109(g), as opposed to section 109(f). However, the debtor argues that based on the provisions of section 109(g), the court was limited to a 180-day prohibition with respect to refiling. 11 U.S.C., sec 105(a) provides as follows:

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, *sua sponte*, taking any action or making any determination necessary or appropriate or enforce or implement court orders or rules, or to prevent an abuse of process.

In In re Stuart Glass & Mirror, Inc., 71 B.R. 332 (Bkrtcy. S.D. Fla. 1987), the bankruptcy court ordered a dismissal with prejudice and ordered a refiling of any further bankruptcy petitions earlier than

two years after the dismissal. In so doing the court stated:

It is both necessary and appropriate that this court prevent a dismissed debtor from refiling another petition and thereby obtaining the benefit of the statutory automatic stay (sec. 362) and imposing upon its creditors and the court the expense and delay of another reorganization proceeding when it has already been afforded one such opportunity.

Id. T 334. See also In re Lerch, 85 B.R. 491, 494 (Bkrtcy, N.D. Ill. 1988) ("There is strong sense that creditors should not be subjected to a repeat of the tortuous and expensive journey they have just been through."), aff'd, Lerch v. Federal Land Bank of St. Louis, 94 B.R. 998 (N.D. Ill. 1989); In re Damien, 35 B.R. 685, 687 (Bkrtcy. S.D. Fla. 1983) ("It would be obviously inequitable to permit the dismissed litigant to file another petition the following day ...).

In considering a case involving similar facts, the court in Lerch v. Federal Land Bank of St. Louis, supra, at 1001, addressed the issue as follows:

When the court has found cause for dismissal with prejudice, the mandate of Section 109(g) is not applicable -- at least to the extent that it merely provides a minimum amount of time before a case may be refiled, not a maximum period of time for which the bankruptcy court may dismiss a case with prejudice when there is dismissal for cause.

Therefore, based on the foregoing, this Court holds that Section 349(a) is not modified or limited by Section 109(g) so long as the bankruptcy court "for cause rules otherwise" and the bankruptcy court's dismissal of the case with prejudice for the two-year period falls under the "for cause" exception to Section 349(a).

It is therefore the opinion of this Court that 11 U.S.C., sec. 349(a) excepts from its provisions a dismissal with prejudice "for cause"; that 11 U.S.C., sec. 109(g) sets forth the minimum period (180

days) in which a debtor is prohibited from refiling after dismissal under its provisions; that 11 U.S.C., sec. 105(a) authorizes under its provisions an order of the bankruptcy court prohibiting it from refiling for a period in excess of 180 days; and that the bankruptcy court did not err in its finding of "cause" and did not abuse its discretion in the three-year prohibition against debtor's refiling. The Court finds the prohibition period reasonable and necessary to allow creditors sufficient time in which to pursue their state court remedies.

The judgment of the bankruptcy court is AFFIRMED.

IT IS SO ORDERED this 29th day of December, 1989.

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United States District Judge

ORDER ON MOTIONS TO DISMISS,  
filed February 14, 1989

IN THE UNITED STATES BANKRUPTCY  
COURT FOR THE WESTERN DISTRICT  
OF OKLAHOMA

IN RE: )  
 ) BK-85-3466-B  
RANDY ARDEN FRIEOUF, ) Chapter 11  
Debtor.

ORDER ON MOTIONS TO DISMISS

Debtor filed his voluntary petition under Chapter 11 on September 30, 1985. In its initial stages, litigation in the case consisted almost exclusively of extensive motion practice in which various creditors sought relief from the automatic stay of 11 U.S.C., sec. 362(a).

Almost nine months after the filing of the petition, debtor filed a plan of re-organization. No disclosure statement was filed at that time and thus no further proceedings with regard to the

plan of reorganization took place. On June 26, 1986, debtor filed monthly operating reports for the months of December 1985 through April 1986. On August 4, 1986, the court ordered debtors to file a disclosure statement by August 20, 1986. No disclosure statement was filed before, on or for more than one year after August 20, 1986. Automatic stay and abandonment litigation continued and on June 25, 1987, debtor filed monthly operating reports for the months of May 1986 through February 1987, and April 1987. On June 30, 1987, Federal Land Bank of Wichita filed its motion to dismiss pursuant to 11 U.S.C., sec. 1112(b).

On September 15, 1987, debtor filed his amended plan of reorganization and

disclosure statement. At an October 6 hearing on Federal Land Bank of Wichita's motion to dismiss, the motion was withdrawn without prejudice to its being refiled. An order was subsequently entered for a hearing on the disclosure statement under 11 U.S.C., sec. 1125. Federal Land Bank of Wichita timely filed its objection to the approval of the disclosure statement and at a hearing held December 8, 1987, debtor was given thirty days to amend his disclosure statement and Federal Land Bank of Wichita was given ten days after the filing of the amendment to review the amended disclosure statement. If no objections were filed, an agreed order was to be presented and the plan of reorganization was to be set for confirmation hearing.

Thereafter, Federal Land Bank of Wichita filed a motions to determine the value of real property, which motion was set for hearing in February 1988. At the date set for the hearing, it was announced that an agreement had been reached and that an agreed order would be submitted. The docket sheet in this case does not indicate that any such order was ever filed.

On September 30, 1986, Farm Credit Bank of Wichita, refiled its motion to dismiss. On November 17, 1988, debtor filed his amended disclosure statement and amended plan of reorganization. A hearing was set for December 13, 1988 to determine the adequacy of the disclosure statement. Farm Credit Bank of Wichita and Farmers Home Administration timely

filed objections to the disclosure statement. At the hearing, the motion to dismiss of Farm Credit Bank of Wichita was denied without prejudice, and the Farmers Home Administration objection to the disclosure statement was withdrawn. The disclosure statement was approved as modified at the hearing and it was ordered that the plan and disclosure statement be mailed no later than December 30, 1988, with a hearing on confirmation of the plan to be held January 25, 1989. Objections to confirmation of the plan were filed by Farmers Home Administration, Farm Credit Bank of Wichita and Grant County Bank and Farm Credit Bank of Wichita refiled its motion to dismiss the case.

At a hearing held January 25, 1989,

it was disclosed that neither the plan nor the disclosure statement was ever mailed to creditors. The motion to dismiss of Farm Credit Bank of Wichita was taken under advisement. Debtor was granted until February 3, 1989 to respond to that motion and to the oral motion of the Assistant United States Trustee to convert this case to a case under Chapter 7. Debtor was specifically requested to address in his response the issue of whether any dismissal should be with or without prejudice. Thereafter, Farmers Home Administration joined in the Farm Credit Bank of Wichita's motion to dismiss asserting a continuing loss or diminution of the estate, the absence of a reasonable likelihood of rehabilitation and the inability of debtor to effectuate

a plan of reorganization. Debtor timely filed his objection to the motion to dismiss and his response as directed by the court.

It is noted that at the December 13, 1988 hearing, counsel responded to the argument that no monthly operating reports had been filed since the filing of the April 1987 report in June 1987, by stating that he, counsel, had all of the subsequent reports in his office and that he had mistakenly believed that they constituted simply copies, rather than originals sent to him by debtor for filing. Improbable though such explanation may have been, the court accepted counsel's offer to transmit all of such reports for filing immediately upon his return to his office. At the January 25, 1989

hearing, it was noted that no reports had been filed, counsel assured the court that they had been transmitted from his office and that he had no idea why they had not been received. He assured the Court that copies would be transmitted for filing immediately. The reports were received and filed on February 10, 1989.

In response to the oral motion of the Assistant United States Trustee for conversion of the case to a case under Chapter 7, debtor asserts simply that he is a farmer as defined by 11 U.S.C., sec. 101(19) and that therefore, under 11 U.S.C., sec. 1112(c), the court may not convert the case unless he debtor request such conversion. Debtor neither provides any evidence whatever or offers to direct the court to any evidence which would

support his conclusory averment that he comes within the statutory definition of "farmer" in 11 U.S.C., sec 101(19). Counsel simply makes the statement then asserts, regally, that "the point cannot be seriously disputed further."

Following the January 25, 1989 hearing, the court was informally advised that the creditors which had objected to the confirmation of debtor's plan intended to formulate and file a liquidating plan of reorganization. Clearly, such would be permissible, since the period during which only the debtor may file a plan of reorganization under 11 U.S.C., sec. 1121(b), expired over three years ago. No such plan has been filed, however, and neither Farm Credit Bank of Wichita nor Farmers Home Administration

has sought to withdraw its motion to dismiss. It would be inappropriate for the court to further delay this already duly protracted proceeding based upon communications not part of the record, particularly when the official record would appear to contradict those communications. The court will therefore consider the motions to dismiss and the oral motion to convert.

Even though counsel's assertion that debtor is a "farmer" as that term is defined in the Bankruptcy Code, is wholly unsupported in the record, the court is prepared to accept the same for purposes of the oral motion only. To do otherwise would simply provide debtor and his counsel with yet another opportunity to delay these proceedings through the

exercise of appellate procedures. Thus, the oral motion to convert will be denied.

As the history of this case, recited above will clearly indicate, there has been little or no apparent effort on the part of debtor or his counsel to formulate a confirmable plan of reorganization. It appears that the only plans which have been filed have been filed solely to create an argument in opposition to various motions seeking to terminate the proceeding. The first plan was not even accompanied by a disclosure statement, and an approved disclosure statement is a necessary prerequisite to the solicitation of acceptances. 11 U.S.C., sec. 1125(b). The failure to file a disclosure statement continued,

even after the court order the filing of the same.

The first amended plan of reorganization was accompanied by a disclosure statement, but after a hearing, when the court directed that the same be amended within thirty days, no further action was taken. The most recent disclosure statement and plan of reorganization were filed 38 months after the initiation of these proceedings, and even after counsel for debtor was directed to transmit to creditors the plan and disclosure statement, as modified, no such transmittal was effected. Counsel now asserts that the court must convene a valuation hearing on certain of the debtor's assets and, presumably, must thereafter once again convene a hearing to determine

whether the disclosure statement should be approved and, if approved, order a hearing on the confirmation of the plan. To date, there appears to be virtually universal rejection of debtor's proposed plan. This, after more than three years during which debtor's creditors have been prevented from exercising their rights with regard to claims against the debtor and his property by reason of the automatic stay.

In his objection to the motions to dismiss and request for conversion, debtor cites the court's denial of Farm Credit Bank of Wichita's motion to dismiss at the December 13, 1988 hearing as constituting res judicata as to anything occurring prior to that date.

As counsel well knows, the denial of the

motion to dismiss was solely for the purpose of permitting the debtor yet another opportunity to demonstrate that he could formulate and obtain acceptance of a plan of reorganization. It did not constitute an adjudication of the merits of the motion to dismiss at that time, and the court made this fact clear when announcing its ruling.

Counsel for debtor also makes it quite clear in his objection that he believes debtor qualifies for relief under Chapter 12 and that, while conceding that he cannot convert from a Chapter 11 to Chapter 12, nothing will prohibit him from filing a Chapter 12 petition upon the dismissal of this case. It is this threat, or promise, however one wishes to view it, which has caused

the creditors to seek extraordinary relief of dismissal with prejudice.

Section 349(a) of the Bankruptcy Code, (Title I of the Bankruptcy Reform Act of 1978, Pub. L. 95-598, 92 Stat. 2545, as amended), is as follows:

Sec. Effect of dismissal.

(a) unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(f) of this title.

The section 109(f) referred to in Sec. 349(a) was added by the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353, and was redesignated as subsection (g) by the Bankruptcy Judges, United States Trustees and Family

Farmer Bankruptcy Ac of 1986, Pub. L. 99-554, when a new subsection (f) was added by the Chapter 12 provisions of that Act. That provision, to the extent material to the court's present inquiry, is as follows:

(g) notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if--

(1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or appear before the court in a proper prosecution of the case

• • •

As was pointed out in In re McClure, 69 B.R. 282 (Bankr. N.D. Ind. 1987):

The Debtor is a fiduciary of this Court and has a fiduciary obligation to its creditors the same as a trustee. — Commodity Future Trading Commission v. Weintraub, 471 U.S. 343 . . . (1985).

The disclosure of financial condition by periodic reporting to interested parties is high on the list of fiduciary

obligations of the debtor-in-possession and is to be excused only for justifiable cause.

In re Modern Office Supply, Inc., 28  
B. R. 943, 945 (Bank. W.D. Okla. 1983)

...  
The Court nor the creditors should have to neither coerce or implore the debtor as a fiduciary into filing timely, accurate and complete monthly operating statements while at the same time the Debtor is asking for the pervasive protection afforded by the Bankruptcy Code.

As was noted by the court in the recitation of the history of this action, the petition was filed in September 1985. Nine months later, monthly operating reports were filed for the third through seventh months following the petition date. Almost one year later, monthly operating reports were filed for 11 of the next 12 months. In July 1987, two additional monthly operating reports were filed. Between July 1987 and February 10, 1989, no further monthly operating re-

ports were filed. Of course, such reports are required to be filed monthly, and the court specifically ordered debtor and his counsel on at least two occasions to forthwith file the same. As is also noted above, the court was assured on those two occasions that the reports had been prepared and could be filed immediately.

The numerous failures to comply with orders of the court, with regard to monthly operating reports, the filing of a disclosure statement, and the transmittal of the disclosure statement and plan, among others, have been cleverly characterized by counsel as being simply the result of misunderstandings on the part of counsel. Misunderstandings which, in several instances, would only

be possible if counsel were unable to communicate in the English language. The court is unfortunately reminded of the hopefully fictional movie or television attorney who avoids or delays certain defeat by engaging in such outrageous behavior as to require a mistrial.

The court has reviewed a number of cases in which dismissal with prejudice is discussed. See Martin-Trigona, 35 B.R. 596 (Bankr. S.D. N.Y. 1983); In re Petro, 18 B.R. 566 (Bankr. E. D. Pa. 1982); In re McClure, supra; In re Mandalay Shores Co-Op Housing Association, Inc., 63 B.R. 842 (Bankr. N.D. Ill., 1986); Matter of Ladd, 82 B.R. 476 (Bankr. N.D. Ind. 1988). Although it is clear that dismissal with prejudice is a drastic sanction which may affect sub-

stantial rights of the litigant and should only be used in extreme situations, In re Martin-Trigona, supra, 35 B.R. at 601, it is equally clear that such sanction may be appropriate where there is a clear record of delay and contumacious conduct. Id. Discussing the finding of unreasonable delays as a result of debtor's conduct, the court in In re McClure, supra, found the following quotation from In re Bystrek, 17 B.R. 894 (Bankr. E.D. Pa. 1982) to be instructive:

The troubling aspect of this case is that debtor's counsel seems to believe that Bankruptcy Court is a legal playground where the debtor can indulge in an elaborate of catch-me-if-you-can with her creditors. Such is not the case. Although the law grants a generous measure of relief to debtors, this benefit is not gratuitous. The law also imposes a measure of responsibility. As a member of the bar and an officer of the Court, counsel should

be especially aware of this fact. The game attempted in this case cannot be permitted.

Having reviewed the almost unbelievably lengthy record of proceedings in this case, the court has become convinced that the criteria established by the cases cited herein as being supportive of the admittedly harsh sanction of dismissal with prejudice, are met. The court is of the view that dismissal with prejudice offers the only feasible means by which the creditors of this debtor can expect to have any opportunity to enforce their rights against the debtor or his property.

The court is also mindful of having made the statement at the most recent hearing in this matter, that it did not

believe that a dismissal with prejudice was warranted in this case. That statement was made prior to the court's thorough review of the lengthy record in this case, of the cases cited by counsel in support of their motions to dismiss, and of debtor's response. Having made that statement, albeit prematurely, it is this court's view that it would be unfair for the court to grant the motions for dismissal with prejudice without allowing debtor an opportunity to show cause why the same should not be granted.

The court will therefore hold in abeyance the motions to dismiss filed by Farm Credit Bank of Wichita and Farmers Home Administration and will set a hearing for the 28th day of February, 1989 at 9:30 a.m., at which debtor will

be directed to show cause, if cause there be, why this bankruptcy case should not be dismissed with prejudice under the provisions of sections 349(a) and 109(g)(1) of the Bankruptcy Code.

IT IS SO ORDERED this 14th day of February, 1989.

/s/ Paul B. Lindsey  
Paul B. Lindsey  
U.S. BANKRUPTCY JUDGE

ORDER OF DISMISSAL,  
filed March 8, 1989

IN THE UNITED STATES BANKRUPTCY  
COURT FOR THE WESTERN DISTRICT  
OF OKLAHOMA

IN RE: )  
RANDY ARDEN FREIOUF, ) BK-85-03466-B  
                          ) Chapter 11  
                          )  
                          Debtor, )

ORDER OF DISMISSAL

On Feberuary 14, 1989, this court entered an order stating that the motions to dismiss filed by Farm Credit Bank of

Wichita and by Farmers Home Administra-  
tion would be held in abeyance pending a  
hearing to show cause why the bankruptcy  
case should not be dismissed with  
prejudice. That hearing was set for  
February 28, 1989.

On February 27, 1989, counsel for  
debtor filed a "Motion to Reconsider,  
Vacate, Alter, Amend and Modify Order of  
Motions to Dismiss and Motion to  
Reschedule Rule to Show Cause Hearing".  
Also on February 17, 1989, debtor's  
counsel submitted a proposed order for  
continuance of the show cause hearing.  
The proposed order was not signed by  
debtor's counsel approving it for entry  
as required by Local Bankruptcy Rule  
12(f). There was no other communica-  
tion from debtor's counsel to the court.

Debtor's counsel failed to appear at the show cause hearing on February 28, 1989, even though the proposed order continuing the hearing had not been entered by the court.

At the show cause hearing, the court dismissed the bankruptcy case with prejudice pursuant to 11 U.S.C., sec. 349(a). Counsel for various creditors requested at the hearing that this court dismiss the case with prejudice to any future filing of a bankruptcy petition for a period of three years. Creditors seek this extraordinary relief because debtor has expressed his intention to file a Chapter 12 petition upon the dismissal of this case. The creditors requested that the prohibition be for three years in order for them to have

sufficient time to pursue their state court remedies.

Section 109(g)(1) of title 11 provides that:

(g) Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if --

(1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case;

This bankruptcy case was dismissed both for debtor's failure to abide by orders of the court, as more fully described in this court's Order of February 14, 1989, and for debtor's failure to appear at the show cause hearing.

Section 349(a) of title 11 states that unless the court orders otherwise, the dismissal does not prejudice the

debtor on refiling except as provided in section 109(g) of this title. Section 349(a) and 109(g, read together, allow the court to look beyond sec. 109(g) and prohibit a debtor from filing a case for more than 180 days. In re Lerch, 85 b.r. 491, 494 (Bankr. N.D. Ill. 1988), aff'd Lerch v. Federal Land Bank, 1989 U.S. Dist. LEXIS 263 (N.D. Ill. 1989) (Chapter 12 case was dismissed with prohibition on filing a petition under any chapter except Chapter 7 for two years).

Further more, the court has the power under 11 U.S.C., sec. 105 to prohibit debtor from filing further bankruptcy petitions.

Section 105(a) grants this court discretion to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." It is both necessary and appropriate that this

court prevent a dismissed debtor from immediately refiling another petition and thereby obtaining the benefit of the statutory automatic stay (sec. 362) and imposing upon its creditors and the court the expense and delay of another reorganization proceeding when it has already been afforded one such opportunity . . . . There is no provision in the Bankruptcy Code or Bankruptcy Rules which prohibits such an exercise of this court's discretion.

In re Stuart Glass & Mirror, Inc., 71

B.R. 332, 334 (Bankr. S.D. Fla. 1987)

(Chapter 11 case was dismissed with prohibition on filing any bankruptcy petition for two years).

As detailed in this court's Order of February 14, 1989, debtor has established a clear record of delay and contumacious conduct which justifies prohibiting the debtor from filing another bankruptcy petition for a period of time. See In re Wehrenberg, BK-87-01991-A (Bankr. W.D. Okla. Aug. 1, 1988) (order stipulating to

dismissal of Chapter 11 case with prejudice to filing subsequent bankruptcy petitions for the greater of 8 months or the completion of certain state court remedies); In re French, BK-86-07318-A (Bankr. W.D. Okla. July 20, 1987) (order dismissing Chapter 12 case with prejudice to filing of subsequent bankruptcy case for years). The three year period requested by the creditors appears reasonable in view of the work load of the state courts.

Accordingly, the motions to dismiss filed by Farm Credit Bank of Wichita and Farmers Home Administration, which were held in abeyance pursuant to this court's Order of February 14, 1989, are hereby granted. This bankruptcy case is dismissed with prejudice to the filing of

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any bankruptcy petition by debtor for a period of three years from the date of this order. Debtor's motion to reconsider the Order of February 14, 1989, is denied.

IT IS SO ORDERED this 8th day of March, 1989.

/s/Paul b. Lindsey  
Paul B. Lindsey